State of California State and Consumer Services Agency

Memorandum

Date : November 9, 1995

To : All Holders of Case Analysis Manuals

From : **Department of Fair Employment & Housing**
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Subject : **Harassment Update**

The purpose of this memorandum is to update the Harassment Chapter of the Case Analysis Manual by summarizing the major changes in harassment law since December 26, 1990. Many of these changes modify the current Harassment Chapter and are noted as such below. In 1996, a revised Harassment Chapter will be issued, incorporating the information contained in this memorandum. Until that time, file this cover memorandum in front of the Harassment Chapter's Table of Contents and read it in conjunction with the existing chapter.

This memorandum is divided into the following sections:

I. **STATUTORY CHANGES**
II. **CHANGES IN REGULATIONS**
III. **CASE LAW DEVELOPMENTS**
IV. **CASE SUMMARIES**
V. **INDEX OF CHANGES TO CASE ANALYSIS MANUAL**

I. STATUTORY CHANGES

A) Harassment Because of Sex Includes Sexual Harassment, Gender Harassment, and Harassment Based on Pregnancy, Childbirth, or Related Medical Conditions (Gov. Code §12940 subd. (h)(3)(C)):

Effective January 1, 1994, Gov. Code section 12940 subd. (h)(3)(C) was added to the FEHA explicitly stating that harassment because of sex includes harassment based on gender, pregnancy, childbirth, or related medical conditions.

1) Prior Law:
Prior to 1994, there was no statutory definition of the phrase "because of sex." However, the Commission and California courts

consistently interpreted the phrase "because of sex" to include sexual harassment, gender, pregnancy, childbirth, or related medical conditions.

2) Effect on Current Version of Case Analysis Manual:
Sections affected include the discussion of the scope of this chapter on page 2, and the list of statutes and regulations on page 35.

II. CHANGES IN REGULATIONS

The Revised Pregnancy Regulations Explicitly Prohibit Harassment Because of Pregnancy, Childbirth, or Related Medical Conditions. (California Code of Regulations, Title 2, section 7291.3 and 7291.5 subd. (a)(7)):

Effective August 12, 1995, revised pregnancy regulations explicitly prohibit harassment because of pregnancy, childbirth, or related medical conditions. California Code of Regulations, Title 2, section 7291.3 state that it is unlawful for an employer with **one** or more employers to harass an employee or applicant. Section 7291.5 subd. (a)(7) reiterates the harassment prohibition.

1) Prior Law:
Prior to enactment of sections 7291.3 and 7291.5 subd. (a)(7), the regulations did not specifically include harassment because of pregnancy.

2) Effect on Version of Case Analysis Manual:
The only section affected is the list of statutes and regulations on page 35.

III. CASE LAW DEVELOPMENTS

A) Commission Decisions

1. Unwanted Racial (Age, Religion, etc.) Conduct Must Be Severe or Pervasive From the Perspective of the Similarly Situated Reasonable Person to Violate the FEHA:

a) Unwanted Racial Conduct Must Be **Either** Sufficiently Severe or Pervasive to Violate the FEHA:

In non-precedential decisions, the Commission has recognized that unwelcome racial conduct (national origin-biased, age-biased, etc.) must be either sufficiently severe or pervasive to create a hostile

work environment. (DFEH v. Fidelity National Title Insurance Co. (Araiza) (1994) FEHC Dec. No. 94-08, at p.16, DFEH v. County of Fresno, Department of Social Services, et al (Pellum and Stanfield) (1994) FEHC Dec. No. 94-13, at p. 35.)

Generally, a **series** of unwanted racial acts must occur to meet the pervasiveness test. Similarly, the acts must be egregious, in terms of their **content**, to constitute **severe** conduct. For example, in the non-precedential decision DFEH v. Fidelity National Title Insurance Co., (p. 5 and 17) the Commission determined that three derogatory remarks about the complainant's Mexican national origin were not severe or pervasive enough to create a hostile work environment.

In Fidelity Insurance National Title Insurance Co., the complainant's supervisor asked the complainant where she was born. After learning about the complainant's Mexican national origin, the supervisor commented that he could not believe Fidelity paid typists so much. Thereafter, the supervisor subjected the complainant to two overt remarks about "Mexican Nationals." On the first occasion, the supervisor referred to field workers as "wetbacks," and "Mexican Nationals" and said "us [sic] Americans don't like to be supervised by Mexican Nationals" (p. 5 and 13). This comment was not personally directed at the complainant, but was part of a general discussion in which complainant participated.

On the second occasion, the Fidelity supervisor was angry with the complainant and told her that she was "nothing but a national" (p. 6 and 13). Despite the fact that the complainant was offended by all three of the supervisor's remarks about her Mexican national origin, the Commission concluded that no harassment occurred. The Commission's own words are instructive in showing what must be established to prove a hostile work environment.

> Even considering all three comments as hostile, however, they were, standing by themselves, neither 'pervasive' enough in terms of their duration or frequency, nor 'severe' enough in their content to constitute an actionable hostile work environment (p.16).

Although the Commission found that the Fidelity supervisor's derogatory national origin comments did not create a hostile work environment, the comments did show that the complainant's termination was partly motivated by national origin bias: "These comments are direct evidence of McDonald's [the supervisor's] bias against complainant as a Mexican national" (p.15).

DFEH v. County of Fresno, Department of Social Services, et. al, (Pellum and Stanfield, 1994) FEHC Dec. No. 94-13, is another non-precedential harassment case in which the Commission offers guidance on what conduct constitutes "severe" or "pervasive" harassment. In County of Fresno, two African-American employees alleged that they were treated differently and subjected to racial harassment by their Caucasian supervisor. The supervisor scrutinized both complainants' work more than she did non-African-American employees on her staff, refused to answer complainants' questions or listen to or implement their suggestions, and lied to complainants about overtime availability (pp. 9,11,34).

The supervisor also made numerous racial comments: (1) a reference to Thursdays being "nigger day" when all African-Americans wore yellow, (2) an observation that an African-American employee wearing a bandanna looked like "the pictures of Aunt Jemima on cereal boxes," (3) several comments in which the supervisor called an African-American male employee "boy," (4) several references by the supervisor and co-workers to complainants as "those in the back," and (5) a conversation in which the supervisor stated that she did not understand why the two complainants were always cold because she thought that "Black people were hot-blooded" (pp. 6,11,13,34).

The Commission found that the supervisor's "those in the back" comments and stereotypical generalizations about African Americans to be racial in content and, as such, evidence of her racial insensitivity toward African Americans. However, the Commission concluded that, in and of themselves, these comments

> . . . were not sufficiently pervasive, in terms of their frequency, or sufficiently severe, in terms of their content, to alter complainants' work environment by making it oppressive and offensive. When, however,

> these statements are coupled with McCoy's [the supervisor's] hostile attitude toward complainants, her behavior toward them, and her previous racially discriminatory statements -- about which complainants were well aware --, we determine that the totality of the circumstances was sufficiently severe and pervasive to have interfered with the work environment... (pp. 35-36).

b) Apply the Standard of a Similarly Situated Reasonable Person in Analyzing Whether the Conduct is Sufficiently Severe or Pervasive to Create a Hostile Work Environment:

For years, the Commission evaluated racial (national origin, age, etc.) harassment from the victim's perspective. (DFEH v. Right-Way Homes (1990), FEHC Dec. No. 90-16, at p. 12, DFEH v. Del Mar Avionics (1985), FEHC Dec. No. 85-19, at p. 18, DFEH v. Fresno Hilton (Burns) 1984 FEHC Dec. No. 84-03, at pp. 29, 32-33.) However, this standard no longer applies. As a result of two recent non-precedential decisions, uncertainty exists over whether the Commission will apply the "similarly situated reasonable person" standard or the "reasonable person" standard to its evaluation of whether the offensive conduct is severe or pervasive enough to create a hostile work environment. (See DFEH v. Fidelity National Title Insurance Co. (Araiza) (1994) FEHC Dec. No. 94-08, at p.16 [Commission applied similarly situated reasonable person standard] and DFEH v. County of Fresno, Department of Social Services, et al (Pellum and Stanfield) (1994) FEHC Dec. No. 94-13, at p. 35. [Commission applied reasonable person standard].)

It is likely that the Commission and California appellate courts will evaluate the severity and pervasiveness of unwanted racial (ancestry, age, etc.,) conduct from the perspective of the **similarly situated reasonable person**. This is consistent with the standard of the **reasonable person of the same gender as the complainant** used in sexual harassment cases. (See Fisher v. San Pedro Peninsula Hospital (1989), 414 Cal.App.3d 590,609, fn. 7; DFEH v. University of California, Berkeley (Forga) (1993) FEHC Dec. No. 93-08, at p. 23; DFEH v. Sky Dive Lounge (1994), FEHC Dec. No. 94-16, at p. 9.

The "similarly situated reasonable person" standard requires the fact-finder to consider how other employees of the same race, national origin, age, etc., would reasonably react to harassing conduct motivated by their protected status. Like the approach used by the courts and the Commission in sexual harassment cases, the "similarly situated reasonable person" standard takes into account the particular experiences and sensitivities of the complainant's protected group.

a. Prior Law:
Prior to the Commission's decision in DFEH v. Fidelity National Title Insurance, its analysis of race/national origin violations did not specifically consider the severity or pervasiveness of the harasser's conduct, or ask whether the similarly situated reasonable person would be offended by such conduct. Instead, the Commission focused on the victim's perception of the unwanted conduct and determined whether a hostile, intimidating or offensive working environment resulted. (See DFEH v. Madera County (1990) FEHC Dec. No. 90-03, at p. 22; DFEH v. Right-Way Homes (1990), FEHC Dec. No. 90-16, at p. 12; and DFEH v. Fresno Hilton Hotel (1984) FEHC Dec. No. 84-03, at pp. 29, 32-33.)

b. Effect on Current Version of Case Analysis Manual:
Sections affected include the discussions applying the complainant's perspective as the proper legal standard on pages 16,19,20, and 21.

2. Severe Conduct Does Not Have To Seriously Affect The Victim's Psychological Well-Being If The Conduct Reasonably Would be Perceived, And Is Perceived, As Hostile Or Abusive:

The Commission and courts do not require that the employee's psychological well-being be seriously affected by the harasser's conduct in order to find a hostile or abusive work environment. (See DFEH v. County of Fresno (1994), FEHC Dec. No. 94-13, at p. 35; DFEH v. Sky Dive Lounge (1994), FEHC Dec. No. 94-16, at p. 9; Harris v. Forklift Systems, Inc. (1993) 114 S.Ct. 367, 371; and Kelly-Zurian v. Wohl Shoe Company (1994) 25 Cal.App.4th 397, 412.)

a) Prior Law:
The Commission has never required that an employee's well-being be seriously effected in order to find a hostile or abusive work environment. The statements in DFEH v. County of Fresno and DFEH v. Sky Dive Lounge merely articulate the Commission's longstanding position on an employee's psychological well-being. Prior to Harris v. Forklift Systems, Inc. (1993), 114 S.Ct. 367, 371, the circuit courts were split on whether establishing a hostile work environment required proof that the plaintiff's psychological well-being was seriously affected. This issue was settled by the United States Supreme Court in Harris v. Forklift Systems, Inc., (1993) 114 S.Ct 367. The court held that one's psychological well-being need not be seriously damaged.

b) Effect on Current Version of Case Analysis Manual:
Sections affected include the discussion of complainant's emotional well-being on page 19.

B) Appellate Court Decisions

Since 1990, there have been only two California appellate decisions which discuss harassment outside of the sexual harassment arena: Roberts v. Ford Aerospace and Communications Corp. (1990) 224 Cal.App.3d 793 [274 Cal.Rptr. 139] and Hunio v. Tishman Construction Corporation of California (1993) 18 Cal.Rptr.2d 253.

1. Roberts v. Ford Aerospace and Communications Corp. (1990) 224 Cal.App.3d 793 [274 Cal.Rptr. 139]

In Roberts, the African-American plaintiff found racially pejorative statements scrawled on the bathroom walls. He was excluded from discussions, meeting times were changed without notice to him so that he arrived late and was reprimanded, and other employees ridiculed him and mimicked his manner of speech. Repeated acts of harassment escalated after he complained to management of racial discrimination. (Roberts v. Ford Aerospace and Communications Corp. (pp. 793,796.) The jury found both the individual harassers and the corporation liable. It found the corporation liable for $292,000 and each individual defendant liable for $1000. The jury also awarded $750,000 in punitive damages against the corporation (pp. 793,797).

The appeals court upheld the jury's decision on liability and damages (p. 796). The court found that substantial evidence existed that showed that the corporation knew of the harassment against the employee since the employee complained about the writing on the bathroom wall, retaliatory removal from training, of hostility and antagonism, and exclusion from his work group. He sought aid from management, the corporation's industrial relations department, and from a highly placed corporate manager. He was fired after writing to the corporate manager (pp. 793, 800-01). Thus, the court concluded that the corporation had ratified the harassing conduct of its employees.

The court stated that ratification may be established by circumstantial or direct evidence demonstrating adoption or approval by the corporation. Such ratification may be inferred from the fact that the employer, after being informed of the harassing conduct, does not fully investigate and fails to repudiate the harasser's conduct by redressing the harm done and punishing or discharging the harasser (pp. 793, 800-01). The court, in upholding the jury's assessment of punitive damages solely against the corporation, stated that such an appropriation was proper because the jury could find that the corporation's ratification of the harassers' conduct merited the imposition of all punitive damages (pp. 793,802).

2. Hunio v. Tishman Construction Corporation of California (1993) 24 Cal.App.4th 792, 18 Cal.Rptr.2d 253).

In Hunio v. Tishman Construction Corporation of California, an employee who had attained the position of first vice-president brought an age discrimination action against his former employer and officers of the employer-corporation. The plaintiff was 56 years of age and had worked for the defendant corporation for 27 years when he was no longer given work projects. The corporation told plaintiff that there were few projects available because of the slow economy. In response, plaintiff offered to relocate, take a salary reduction, or take an unpaid leave until work improved. This offer was rejected. However, when a project developed that normally would have been assigned to plaintiff, a younger man in his twenties was given the project. The corporation continued to assign younger men to projects that plaintiff was capable of doing (pp. 253,257).

The court concluded that a pattern of harassment existed over many months, eventually culminating in the plaintiff's resignation. Specifically, the court noted that plaintiff was stripped of his management staff, responsibilities, and authority, and denied projects while younger men were promoted to these projects (pp. 253,259). The court found that the constant harassment as to whether plaintiff had a job was sufficient evidence that he was subjected to a pattern of abusive and discriminatory treatment. The court thus affirmed the award of $2.1 million in economic damages, $2 million in emotional distress damages, and $1 million in punitive damages. (pp. 253, 264-66.)

C) Important Ninth Circuit Harassment Decisions Since 1990

1. Woods v. Graphic Communications (9th Cir. 1991) 925 F.2d 1195

The issue of union liability for racial discrimination and harassment was raised in the 1991 Ninth Circuit case Woods v. Graphic Communications. In Woods, a labor agreement contained an explicit anti-discrimination clause. Despite this clause, racial jokes, cartoons, comments and other forms of hostility were common at the workplace. Such conduct was directed at almost every racial and ethnic group, particularly blacks. Plaintiff was personally subjected to several racial remarks and hostility by his co-workers, including a union job steward[1]. For example, he was instructed to wash his hands in a urinal, and at one point, the letters "KKK" appeared on a machine near his work area. Plaintiff sought psychological counseling and took several medical leaves (pp. 1195,1198).

The court rejected the union's argument that the incidents directed at plaintiff were insufficient to create a hostile environment. It stated that while an isolated incident is not enough, the number of incidents alone is not determinative. Conversely, incidents that are less severe may constitute harassment in the context of a working atmosphere in

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[1]The court concluded that the Union was also liable for the acts of its steward, even though the steward was not acting within the context of a grievance procedure. It based its conclusion on the fact that an employer would be liable for acts of its supervisors when the employer knew or should have known the supervisor was engaged in harassing conduct (p. 1202).

which there is constant racial tension (pp. 1195,1201-02). The court then held that plaintiff's work environment was sufficiently hostile to constitute racial harassment under Washington state's anti-discrimination statute[2] (pp. 1195, 202).

The court also held that 42 U.S.C. section 1981[3] was violated by the Union's actions. It stated that although racial harassment alone does not violate section 1981, a union, entrusted with enforcing the labor contract, may violate section 1981 if by racial discrimination it interferes with its members' ability to enforce their contract (pp. 1195,1203). In this case, the Union refused to file grievances regarding the harassment and it did not act to discipline its job stewards and other officers for their individual acts of harassment. Thus, the court concluded that the requisite showing of discriminatory motive, necessary for a section 1981 violation, was present on these facts (pp. 1195, 1203). In addition, the court held that the Union's refusal to file grievances on behalf of the plaintiff constituted a violation of the Union's duty of fair representation under the National Labor Relations Act (pp. 1195,1203).

IV. CASE SUMMARIES

A) Fair Employment and Housing Commission Non-Precedential Decisions

DFEH v. County of Fresno, Department of Social Services, et. al, (Pellum and Stanfield) (1994) FEHC Dec. No. 94-13. Race (African-American) --- harassment. Commission found employer liable for work environment racial harassment and for failure to take all reasonable steps to prevent harassment and discrimination from occurring. The Commission applied the reasonable person standard to its evaluation of the severity or

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[2]Because the Union was named as a party after the suit had commenced, the Title VII claims against it were barred by the procedural limitations of Title VII. The court, however, analogized to Title VII law because Title VII is very similar to Washington's own anti-discrimination statute.

[3]42 U.S.C. section 1981: "... All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts... as is enjoyed by white citizens..." Derived from section 1 of the 1866 Civil Rights Act and sections 16 and 18 of the 1870 Civil Rights Act.

pervasiveness of the conduct, and awarded emotional distress damages in the amount of $25,000 to Stanfield and $15,000 to Pellum. Additionally, it held that the complainant does not have to suffer psychological damage to prove the severity of the conduct. The supervisor was found personally liable as an agent-employer and as "any other person" under Gov. Code section 12940 subd. (h).

DFEH v. Fidelity National Title Insurance Co. (Araiza) (1994) FEHC Dec. No. 94-08. National Origin (Mexican) --- harassment and termination. Commission did not find the employer liable for work environment national origin harassment or for failing to take all reasonable steps to prevent harassment and discrimination from occurring; however, it did find the employer liable for national origin discrimination in its termination of complainant. The Commission applied the similarly situated reasonable person to its evaluation of the severity or pervasiveness of the conduct. Complainant was awarded back pay and $7000 in emotional distress damages.

B) **Related Fair Employment and Housing Commission Sexual Harassment Decisions**

Please refer to the **CASE SUMMARIES** section of the **SEXUAL HARASSMENT CHAPTER** for further explanations of these decisions.

DFEH v. Sky Dive Lounge, (Fuentes) (1994) FEHC Dec. No. 94-16.

DFEH v. University of California, Berkeley (Forga) (1993) FEHC Dec. No. 93-08.

DFEH v. Fresno Hilton (Burns) 1984 FEHC Dec. No. 84-03.

C) **California Appellate Decisions**

Hunio v. Tishman Construction Corporation of California (1993) 24 Cal. App.4th 792, 18 Cal.Rptr.2d 253. Age - Employer found liable for harassment and constructive discharge. The court concluded that there was sufficient evidence to prove plaintiff was subjected to a pattern of abusive and discriminatory treatment. It affirmed the award of $2.1 million in economic damages, $2 million in emotional distress damages, and $1 million in punitive damages.

Roberts v. Ford Aerospace and Communications Corp. (1990) 224 Cal.App.3d 793. Race (African-American) --- Court upheld jury's findings of liability against employer and certain individual supervisors for the following: (1) retaliatory discharge in violation of public policy (racial discrimination and harassment), (2) tortious breach of the covenant of good faith and fair dealing, and (3) breach of contract. The court also upheld plaintiff's damages award. Employer was assessed $292,000, with each individual defendant assessed $1000, in economic and non-economic damages. The employer was separately assessed $750,000 in punitive damages. In addition, the court found substantial evidence that the corporation knew of the harassment against the employee, thus ratifying the harassing conduct of its employees.

Watson v. Department of Rehabilitation (1989) 212 Cal.App.3d.1271. Sex (female) and race (African-American) Discrimination - Court held that the Workers' Compensation Act does not preempt a harassment or discrimination claim brought under the FEHA. (more research needed)

D) **Related Sexual Harassment Appellate Court Decisions**

Please refer to the **CASE SUMMARIES** section of the **SEXUAL HARASSMENT CHAPTER** for further explanations of these decisions.

Fisher v. San Pedro Peninsula Hospital (1989) 414 Cal.App.3d 590.

Kelly-Zurian v. Wohl Shoe Company (1994) 25 Cal.App.4th 397.

E) **Federal Court Decisions**

Woods v. Graphic Communications (9th Cir. 1991) 925 F.2d 1195. Race (African-American) Court found Union liable under Washington state law for workplace racial discrimination and harassment by the Union and its job stewards. The court analogized to Title VII law as Title VII is very similar to the state's own anti-discrimination statute. In addition, the court found the Union liable for a violation of 42 U.S.C. section 1981 for its failure to file grievances protesting the harassment plaintiff was suffering. The court rejected the Union's argument that the incidents directed at plaintiff were insufficient to create a hostile environment. It stated that while an isolated incident is not enough, the number of incidents alone is not determinative. Conversely, incidents that are less severe may constitute harassment in the context of a working atmosphere in which there is constant racial tension.

F) Related Sexual Harassment Federal Decisions

Please refer to the **CASE SUMMARIES** section of the **SEXUAL HARASSMENT CHAPTER** for further explanations of these decisions.

Harris v. Forklift Systems, Inc. (1993) 114 S.Ct. 367.

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